Bank of America

December 24, 2009

BY FIRST CLASS MAIL AND
ELECTRONIC MAIL

Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

**Re: Regulation Z: Docket No. R-1364**

Dear Ms. Johnson:

Bank of America Corporation ("Bank of America") appreciates the opportunity to comment on the Board's proposal (Docket R-1364) to revise its Regulation Z, implementing the Truth in Lending Act ("TILA" or the "Act"). Bank of America operates the largest and most diverse banking network in the United States with S1.8 trillion in total assets and over $800 billion in worldwide deposits. We offer full-service consumer and commercial services in 33 states and the District of Columbia, with over 6,100 retail branch locations and nearly 18,700 ATMs. We are proud to be one of the leading home finance providers in the nation. We are the largest residential mortgage lender and servicer in the United States providing service to more than 14.3 million households holding mortgage and home equity loans. Accordingly, we devote significant resources to TILA compliance measures.

Bank of America shares the Board's desire to ensure that consumers are made fully aware of the terms of transactions they are considering. Indeed, we have implemented a simple, one page "Clarity Commitment" disclosure designed to present material transaction terms in plain English. We believe the Board's efforts to simplify and harmonize the various disclosures required under TILA for real-estate secured transactions will be a significant step in the same direction. Our comments on the proposal follow.

## Global Comments

### A. Effective Date

The Board's proposal represents the most comprehensive change to Regulation Z since the regulation was first adopted. In many respects, the proposal rebuilds Regulation Z from the ground up, and industry compliance efforts will have to follow the same path. Creditors will be required to undertake a complete and fundamental redesign of compliance forms, procedures and systems. As recent experience with HUD's Regulation X changes amply demonstrates, this process will require considerable time, effort and expense. We urge the Board to make its regulations effective no sooner than 18 months after both a final rule and final Official Staff Commentary are published. Indeed, the Board might consider a 24 month effective date (with

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optional earlier compliance) since it would give the staff time to issue the additional interpretive material that will undoubtedly be necessary as creditors work through full implementation of the new requirements.

**B. Finance Charge and "All-In APR"**

The proposal would significantly revamp the rules regarding what fees and charges must be incorporated into APR calculations. The existing finance charge exclusions are based on a variety of considerations including (i) certain charges are not "shoppable" and will be incurred regardless of what loan is selected; (ii) certain charges are relatively small and therefore have a negligible effect on the cost of transactions; (iii) certain charges are established or imposed by third-parties (including government entities) that are not controlled by the creditor; and/or (iv) certain charges are voluntary and not required as an incident of the transaction. We strongly support meaningful and comprehensive APR and settlement charge disclosures. At the same time, we believe the policy considerations underpinning the current rules retain considerable merit and therefore, we counsel for the continued exclusion of certain charges as outlined below.[1] Moreover, we believe appropriate tolerances should continue to be applicable to disclosed amounts.

1. *Settlement Agent Charges:* Under current section 4(c), charges imposed by settlement agents are excluded from the finance charge. Settlement agents are third parties who are not under the control of the creditor. Accordingly, fees they impose should continue to be excluded from the finance charge.

2. *Government Fees:* Under Section 4(e), recording and similar fees imposed by government entities are excluded from the finance charge. These fees, of course, do not vary from creditor to creditor and are unavoidable in real-estate secured transactions. In addition, these fees are a relatively small component of the finance charge and have negligible effect on the APR. Finally, tracking the precise amount of these fees in jurisdictions across the country presents a formidable compliance challenge for a nationwide lender such as Bank of America, if it can be effectively done at all. Consequently, we strongly urge the Board to preserve the current finance charge exclusions in Section 4(e).

3. *Flood Insurance:* We support the continued exclusion of hazard insurance premiums from the finance charge. We believe, however, that flood insurance should also continue to be excluded.

4. *Tolerances:* The Board solicited comment on appropriate tolerances for finance charge items. We agree that anything other than a de minimus tolerance would not be appropriate for the creditor's own charges. On the other hand, as recognized in HUD's new RESPA rules, a greater margin is appropriate for charges set by third parties. Accordingly, for non-creditor fees (other than those we suggest should

[1] Comments on the proposed rules relating to charges for debt cancellation products are discussed elsewhere in this letter.

continue to be excluded entirely from the finance charge), we recommend that the Board implement a tolerance equal to 10% over the charges imposed on the GFE for those charges covered by the RESPA 10% tolerance. This would enable creditors to manage to the same rules for both TILA and RESPA compliance.

As a final point, as the Board notes, expanding the finance charge definition will cause additional loans to pass APR thresholds applicable under HOEPA and the recent Higher-Priced Mortgage Loan requirements, as well as a number of state laws that reference these requirements. Accordingly, we recommend that the Board revise the definition of "points and fees" to exclude charges that are currently excluded from the finance charge definition.

### C. Coordination with RESPA

As the Board is aware, the mortgage lending industry is now completing a year-long implementation of new requirements under HUD's RESPA regulations. While RESPA traditionally focused on settlement charges and TILA focused on credit terms, these lines have blurred considerably as regulations under each statute have evolved. Accordingly, we urge the Board to work with HUD on harmonizing the two regulatory frameworks. In particular, tolerances and terminology should be consistent as much as possible between the regulations. The considerable steps the Board has taken to develop an integrated disclosure framework will be significantly undercut if RESPA and TILA disclosures are not harmonized.

## Closed-End Disclosures

We support the Board's efforts to clarify and integrate the various disclosures required under Regulation Z. On balance, we believe the proposed changes will greatly simplify disclosures for consumers and enhance understanding of the mortgage transaction. We offer the following technical comments on the proposed closed-end disclosures.

1. *Key Questions Disclosure:* Many ARM loans may have relatively long initial fixed rate periods. Accordingly, we do not believe the disclosure should suggest that ARMs adjust "after a short period." Rather, the form might indicate that "some" loans adjust after a short period while others have more extended fixed-rate periods. Moreover, escrows can cause payment increases for all loans, not just "some" loans as indicated in the disclosure.

2. *Fixed vs. Adjustable Disclosure:* As observed in our comment on the "Key Questions" disclosure, not all ARMs call for rapid rate and payment adjustments and the form should reflect this.

3. *APR vs. APOR Graph:* We are concerned that systems will not be able to produce the graphical representation of the relationship between the APR and the average prime offer rate called for in the proposed model forms. Accordingly, we would suggest eliminating the requirement for the graph and limiting the disclosure to the numerical values as currently set forth in the "How does this loan compare" paragraph.

The Board also requested comment on two alternatives for handling APR changes that may occur after the delivery of a "final" TILA disclosure. We would recommend the second alternative in which a new disclosure would be required only if the APR moved beyond an established tolerance. Requiring a redisclosure in all instances, as would be the case under the first alternative, could result in repeated delays for consumers as a new 3-day waiting period would be required. While this may be appropriate for material changes, it is not for smaller ones. Moreover, a reduction of any magnitude in the APR should not trigger redisclosure.

## Insurance-Related Proposals

### A. Inclusion of Debt Cancellation Contract Fees in Finance Charge

Under current Section 4(d)(3) of Regulation Z, fees for voluntary debt cancellation contracts ("DCCs") are excluded from the finance charge on closed-end and open-end credit transactions if the creditor discloses to the consumer in writing the fact that the DCC is optional, the fee for the initial term of coverage, and the term of coverage if less than the term of credit, before the consumer signs or initials an affirmative written request for coverage.

The proposal would eliminate the existing exclusion for closed-end credit transactions secured by real property, even for voluntary DCCs, while continuing to permit creditors to exclude DCC fees from the finance charge for other closed-end and open-end credit transactions as long as certain conditions are met. We understand the Board's primary concern is that the inclusion of some fees in, but exclusion of other fees from, the finance charge can be confusing and may not give consumers an accurate picture of the full amount they will be required to pay for the DCC during the course of the loan. For the reasons stated below, we do not believe the proposed revisions are necessary to address consumer confusion and in fact may result in more consumer confusion than exists in today's regulatory environment. Accordingly, we urge the Board to consider the alternative approach outlined below.

1) Voluntary vs. Required

As outlined below, we are confident that our customers understand that DCC is voluntary. Including fees for voluntary DCCs in the finance charge will create the appearance that the DCC is required to be paid for by the borrower rather than being an optional selection, which is contrary to the nature of our DCCs and may raise issues under other regulatory requirements.

Bank of America's mortgage DCCs are optional, and a borrower's decision whether to purchase a DCC does not affect his or her application for credit or the terms of any existing credit agreement with Bank of America. This is required by the Office of the Comptroller of the Currency's ("OCC") regulation on DCCs and is strictly adhered to by Bank of America. Not only is the borrower's initial decision whether to purchase the DCC optional, but the borrower's continued enrollment in the DCC remains optional as well; our borrowers can cancel the DCC at any time. Importantly, if a borrower selects one of Bank of America's DCCs but ceases to pay the monthly fee for a specified period of time, the DCC is cancelled from the borrower's loan with no adverse impact to the borrower's loan (such as default or foreclosure) and no adverse credit reporting impact. In effect, fees for Bank of America's DCCs are not required to be paid by the borrower under the loan – instead, a borrower may continue paying for the DCC in exchange for being eligible to receive benefits, or they can cease paying for the DCC and it will simply cancel off of the loan after a specified period of time without any other adverse impact to the borrower's loan or credit.

In light of the fact that fees for Bank of America's DCCs are not required to be paid by our borrowers, we do not believe it is appropriate to include these fees in the finance charge. Including voluntary DCC fees in the finance charge may cause our customers to believe DCC fees are a required portion of their loan payment, will be inconsistent with our other disclosures that the DCC is optional, and creates potential regulatory risk with the OCC by creating the appearance that the DCC is required rather than optional, or that acceptance of the loan is somehow 'tied' to acceptance of the DCC.

2) Overstated Amount

Bank of America's current DCC offering, Borrowers Protection Plan®, on first mortgage transactions (i.e., closed-end credit secured by real property) is offered for a maximum 10-year term, with the first year offered at no cost to protect a single borrower and at a discount to protect joint borrowers. Many of our borrowers cancel their protection after the no-cost or discounted first year period, and almost all borrowers cancel their protection at some point before the end of the maximum 10-year term. This is generally due to either a closing or refinancing of the loan, the borrower deciding he or she no longer wishes to pay for the protection, or the borrower having used all benefits available under the DCC.

Requiring that we include in the finance charge the full amount that a borrower could potentially pay if he or she kept the DCC for the full 10-year term raises several concerns. First, as noted, almost all of our customers do not keep the protection for the full 10-year term. As a result, the finance charge will be artificially inflated, quite significantly in some cases, for almost our entire portfolio of DCC customers, since the finance charge will reflect what the customer will be required to pay in exchange for the full 10-year term of the DCC when in reality many will incur much lower charges. In addition to the consumer confusion this will create, we believe this will also put Bank of America at a competitive disadvantage because it will require the inclusion of an amount in the finance charge that the customer will in the vast majority of cases not be charged, thereby causing Bank of America's finance charge rate to artificially appear higher than the rates of other creditors that do not offer similar loan features or the same as or similar to the rates of other creditors that have mandatory rather than optional DCCs or other products.

Finally, including DCC fees in the finance charge without taking into consideration the benefits that a borrower may receive in exchange does not present an accurate net cost of the DCC to the borrower. Unlike principal and interest payments and other fees that are included in the finance charge, the payment of which do not involve the potential for return of economic benefit to the borrower, DCCs are designed to provide economic benefit back to the borrower upon the occurrence of certain specified events in exchange for the fees they have paid. As a result, we do not believe it is appropriate to include DCC fees in the finance charge without also taking into account the benefits that a borrower may receive in exchange for those fees. Obviously, this would be impossible to calculate because we cannot predict which customers will experience an event eligible for benefits or what amount of benefits they will receive. However, we do know what our average benefit ratios are (i.e., the ratio of benefits provided to fees received), which means we could potentially reduce the fee amount reflected in the finance charge by the average amount of benefits we expect to provide (based on historical experience). Of course, the problem remains that the amount will not be exact for each borrower, but in our view this is no different than the fee for the full 10-year term not being an exact amount since most if not all borrowers will cancel at some point before the full 10-year term expires. We believe this potential for inaccuracy further reflects the need for an alternative approach in order to ensure that customers understand what they are buying and the cost they will be paying for it.

3) Competitive Imbalance

Requiring DCC fees to be included in the finance charge for closed-end credit secured by real property or a dwelling will disadvantage DCCs against other products that may not be materially different in terms of the costs they will impose on consumers. We are not aware of any products that are similar to Bank of America's DCC on first mortgage loans, nor are we aware of any significant credit insurance programs being offered in connection with first mortgage loans prior to closing. We are aware, however, of certain "mortgage protection insurance" products. These products are underwritten by third party insurance carriers rather than by creditors themselves (although sometimes these carriers are affiliated with creditors or the products are marketed through a creditor's affiliated insurance agency), and usually offer to pay the borrower's lender a certain amount to be applied to the borrower's loan if the borrower experiences certain qualified events. Because these products are marketed to customers *after* closing, they would not be subject to the proposed requirement to include fees or premiums within the finance charge, as the products are not "written in connection with the credit transaction." Currently, we do not have the option to offer our first mortgage DCC after loan closing due to investor requirements. As a result, the proposed changes will unfairly tilt the competitive field in favor of one particular type of coverage, thus stifling innovation and consumer choice.

The competitive disadvantage will be created when a borrower compares the APR of a product offered pre-closing to one offered one immediately after closing. The former loan will appear to the borrower as being higher priced than the latter one. The competitive disadvantage will be particularly pronounced for us because a large number of purchase mortgage customers currently choose to enroll in the Borrowers Protection Plan because of the no-cost (or discounted) offer for the first year. Our customer research demonstrates that customers value DCCs. We do not want to stop offering this DCC to our customers because a change in regulation has the unintended consequence of disadvantaging one type of product versus another.

4) Bank of America Process and Proposed Alternatives

We share the Board's concern with ensuring that borrowers fully understand the costs of their loans, including optional features such as DCCs. We believe, however, that this objective can be achieved without including DCC charges in the APR. We would like to provide a



Recycled Paper

summary of Bank of America's typical sales process for its first mortgage DCC, and Borrowers Protection Plan, and then offer some proposed regulatory alternatives to the Board's proposal.

We offer the Borrowers Protection Plan ("BPP") to borrowers during the loan origination process. The initial offer is made once an application is taken and includes a verbal description of the DCC, the monthly fee, and the short-form disclosures required by the OCC debt cancellation regulation. These disclosures include that (i) the DCC is optional and the customer's decision to purchase will not affect his or her application for credit or the terms of any existing credit agreement he or she has with Bank of America, (ii) we will provide additional information about the DCC before he or she is required to begin paying for the DCC, (iii) this information will include a copy of the contract containing the terms and conditions of the DCC, (iv) there are eligibility requirements, conditions and exclusions that could prevent the borrower from receiving benefits under the DCC, and (v) the borrower should carefully read the contract for a full explanation of the terms of the DCC. In cases where the DCC is initially offered in person, the borrower is also provided with a written description of the DCC, fee information, a copy of the contract containing the terms and conditions of the DCC, and the written long-form disclosures required by the OCC's debt cancellation regulation. These written disclosures include the same content as the short-form disclosures described above, as well as a statement of the total fees that the borrower will pay if they keep the DCC for the maximum term of the feature (for open-end credit, this is instead of a statement of how the monthly fee is calculated) and a statement of the borrower's and Bank of America's respective rights to cancel the DCC. This information also includes a disclosure of the term of the DCC, thereby meeting all of the Regulation Z requirements to exclude BPP fees from the finance charge as well. Within three business days following the initial offer, Bank of America mails written materials to the borrower describing the DCC, the monthly fee and a confirmation whether the borrower elected to enroll in the DCC or not, together with the written OCC long-form disclosures and, if the customer elected to enroll, a copy of the contract containing the terms and conditions of the DCC. Subsequently, the borrower's loan processor will confirm the customer's DCC election during loan processing and again prior to closing. At closing, the customer is again provided with a written form confirming the customer's DCC election and, for customers that elect to enroll in the DCC at or before closing, a description of the DCC and monthly fees, a copy of the contract containing the terms and conditions of the DCC, and the written OCC long-form disclosures. After loan closing, customers who chose to enroll in BPP will receive a welcome package, which again reminds the customer about the DCC they have enrolled in and what the fees are. This package also includes Bank of America's "Getting Started" document, which explains in clear, simple, brief and easy to understand terms how the DCC works and how the customer can file a benefit request. Finally, approximately ten months into the borrower's loan term, Bank of America provides borrowers with a letter reminding them that their no-cost or discounted period will be expiring at the one-year mark, reiterating what the regular fees will be at that time, and noting that the borrower can cancel BPP at any time.

As you can see, Bank of America's sales process not only meets the applicable OCC and existing TILA regulatory requirements, but it also provides multiple touch-points with borrowers to ensure they have an adequate understanding of the DCC they are purchasing, what they will be charged in exchange for the DCC, and that the DCC is optional and can be cancelled at any time. From our perspective, ensuring our customers understand these three points is critical to achieving strong customer retention rates for our DCCs. In fact, Bank of America recently conducted a customer survey and found that approximately 93% of customers surveyed understand that BPP is optional and is not required to be purchased by the borrower as part of his or her loan.[2] This feedback provides strong evidence that the disclosures Bank of America provides are adequately communicating to customers that the DCC is voluntary and not required, and we believe this paradigm could form the basis for a rule of broader applicability. In lieu of the proposed changes, we would urge the Board to provide that BPP/DCC charges may be excluded from the finance charge if the creditor (i) complies with the OCC's debt cancellation regulation, (ii) sends one follow-up communication about the DCC after loan closing; and (iii) allows a refund of all fees paid if the customer cancels within a certain initial period, as further described below.

Adopting the requirements of the OCC's debt cancellation regulation would, among other things, require that creditors provide the verbal short-form disclosures and written long-form disclosures to customers, which clearly communicate the fact that the DCC is optional and is not required to obtain the loan, what the fees are on a monthly basis and over the maximum term of the DCC, what the consumer's and creditor's rights to cancel are, and a direction to carefully review the contract containing the terms and conditions of the DCC. With the addition of the requirement to send a follow-up communication to borrowers after loan closing, creditors could ensure that customers understand what they have purchased, and would be doing so after the sometimes complex loan closing process has concluded. The communication would again describe the DCC, encourage customers to review the DCC terms and conditions they received at closing of their loan, provide a description of the periodic fees that will be charged to the borrower, and reiterate that the DCC is optional. The communication could also include the type of information presented in Bank of America's "Getting Started" document, which explains in clear, simple, brief and easy to understand terms how the DCC works and how the customer can file a benefit request. In addition, the communication would advise the customer that if they no longer want the DCC they can cancel and receive a refund of any fees paid. This refund period would of course need to be capped, and we would therefore recommend that the follow-up communication be required within the first 60 days of the loan, and the borrower would then have 30 days from the date of the letter to request cancellation and a full refund of any fees they may have paid (i.e., a maximum of 90 days of DCC fees could be refunded, depending on the date of the letter). If desired, we would also support a requirement that customers be required to make their decision to cancel and receive a refund of fees paid no earlier than 60 days from the loan closing date, meaning that a minimum of 60 days and a maximum of 90 days of DCC fees could be refunded, again depending on the date of the letter.

In addition, we would support a requirements that for programs involving a no-cost or discounted introductory period, that the creditor send notice to the borrower at least thirty days prior to the end of that period stating what the new fee will be. We would also support a requirement that the creditor provide a refund of any fees paid by a borrower who cancels the

[2] Results based on the "Simplified Borrowers Protection Plan Awareness and Usage Study" conducted by Phoenix Marketing International in 2008. A telephone survey was conducted with approximately 419 customers acknowledging having Borrowers Protection Plan on their loan, between October 6 and November 1, 2008. The sample for the study consisted of customers who purchased BPP between May and September, 2008. Approximately 93% of these customers recalled that Bank of America representative explained that Borrowers Protection Plan was optional during loan origination and that the Plan was not required in order to apply for or obtain their mortgage.

DCC within the first 60 days after the DCC converts from the no-cost period to a fee. This would give customers yet another opportunity to cancel and obtain a refund once they begin to be billed for the protection. With respect to customers that paid a discounted rate during the initial period, we would support a requirement that the creditor provide a refund of the new, higher fees paid by the borrower who cancels the DCC within the first 60 days after the DCC converts from the discounted period to the higher rate.

We would also note that, while we do not support the elimination of the finance charge exclusion for any voluntary DCC, we are not actively opposed to adoption of the Finance Charge Exclusion for closed-end credit secured by real property for DCCs which are optional at purchase but which do not permit a borrower to cancel their protection at any time. If the Board continues to seek adoption of a rule eliminating the finance charge exclusion for closed-end credit secured by real property, we would recommend that such a rule apply only to mandatory DCCs and voluntary DCCs which do not permit a borrower to cancel the DCC at any time.

**B. Eligibility Restrictions**

The proposal would continue to permit the exclusion of charges for DCCs offered in connection with non-real estate-secured and all open-end transactions provided that, among other things, the borrower meets any applicable age and employment requirements under the DCC at the time of enrollment. If the creditor offers a bundled DCC and the borrower does not meet the age and employment criteria for all features, the proposal would require that the creditor either (i) include the DCC fee in the finance charge or (ii) offer the borrower the option of selecting only the features for which the borrower is eligible at the time of enrollment and exclude the DCC fee from the finance charge if the borrower selects only those features.

The proposal suggests that a reasonable consumer would not voluntarily purchase a DCC if they do not meet certain age and employment eligibility requirements at the time of enrollment. We would note, however, that DCCs are generally offered in a bundled package, such as Bank of America's DCC which includes Disability, Involuntary Unemployment, Hospitalization and Loss of Life protection features. Bank of America does not use age as an eligibility factor (and therefore does not disagree with the proposal solely as it relates to age), however employment is an eligibility requirement under both the disability and involuntary unemployment features. Although a consumer may be unemployed at the time of enrollment in the DCC, the consumer may decide to purchase the full bundle of features because they have every intention of becoming employed after enrollment, and they understand that DCCs may not be available after closing. A requirement that creditors include DCC fees in the finance charge if the consumer does not meet an employment eligibility requirement at the time of enrollment may cause some creditors not to offer these consumers the full bundle of features in order to avoid the operational impact of including the DCC fees in the finance charge. In fact, this is contemplated within the proposal since it would permit creditors to exclude the DCC fees from the finance charge if they offer and the consumer accepts a bundled DCC that is missing the feature(s) for which the consumer does not meet the employment eligibility requirements at the time of enrollment. In this way, the consumer's choice about what protection features they wish to purchase would essentially be taken away from them. This is particularly the case where the DCC is only offered at closing of the loan or line of credit, and that is the consumer's only opportunity to purchase the protection during their entire loan term. In this situation, the consumer would never have an opportunity to purchase features that have proven to provide value to thousands of customers, particularly unemployment-related features in today's economic environment. We do not believe this is the right result for the consumer.

We believe the Board's policy objectives can be achieved by adopting the disclosure alternative we have outlined above for both real-estate and non-real estate secured transactions. The disclosures required in the follow-up communications that would be required and the disclosures provided during the origination process could clearly and conspicuously identify whether age or employment eligibility criteria apply to any of the features under the DCC. If the Board does not believe disclosures of eligibility criteria will sufficiently address its concern, we would also support implementation of a waiver process whereby a consumer could be required to specifically acknowledge, as part of their affirmative consent to purchase, that they do not meet age or employment requirements of certain features at the time of enrollment and still purchase the DCC with those features. If the Board implements such a waiver process, we would urge that the acknowledgement be permitted to be incorporated into the Telephone Sales Rule for credit transactions eligible for that rule.

We would again note that, while we do not support the inclusion of DCC fees in the finance charge for voluntary DCCs in light of the concerns previously identified, we are not actively opposed to adoption of the proposal to require DCC fees to be included in the finance charge for DCCs that are optional at purchase but which do not permit a borrower to cancel their protection at any time. If the Board continues to seek adoption of a rule requiring inclusion of DCC fees in the finance charge if a consumer does not meet certain eligibility criteria at the time of enrollment, we would recommend that such a rule apply only to mandatory DCCs and voluntary DCCs which do not permit a borrower to cancel the DCC at any time.

As a final note, the proposal requests comment on whether a creditor should be required to determine eligibility after a DCC is sold, such as at time of renewal, or if creditors should be required to give notice when the borrower exceeds age limits. As previously noted, Bank of America's mortgage and line of credit DCCs do not use age as an eligibility factor. With respect to employment, Bank of America's mortgage and line of credit DCCs do not have a "renewal" period. Instead, these DCCs continue for a maximum 10-year term unless sooner cancelled. We believe that the type of disclosures described above, including the follow-up communication after the loan is closed or line of credit is opened, will adequately communicate eligibility requirements to consumers to allow them to make an informed decision whether to voluntarily purchase an optional DCC. The proposal also requests comment on whether other examples of "reasonably reliable evidence" of a consumer's age or employment status should be included. We would recommend that the proposal be modified to define "reasonably reliable evidence" to include any verbal or written communication from the borrower to the representative making the DCC offer to the borrower. We believe this would be more consistent with the Telephone Sales Rule by permitting verbal borrower statements to meet the regulatory requirement, and would meet operational practicalities for in-person solicitations as well.

### C. Disclosures

The proposal would require creditors to provide borrowers with new disclosures for DCCs related to open-end credit transactions (including HELOCs) and closed-end credit transactions not secured by real property if the DCC is voluntary and the borrower qualifies for age and employment eligibility criteria at the time of enrollment. For closed-end credit transactions secured by real property or dwelling, the new disclosures would be required whether or not the DCC is voluntary. We believe certain of these disclosures are excessive and that they are not necessary to achieve – and may indeed undercut – the purposes of TILA.

1) "STOP . . ." Disclosure

The proposal would require creditors to provide the following disclosure: "**STOP**. You do **not** have to buy this product to get this loan." In the Supplementary Information, the Board explains that, whereas only half of participants surveyed understood that accepting a credit insurance product was voluntary and that they could decline the product, all participants understood the voluntary nature of the product upon reading the aforementioned disclosure.

We would first point out that Bank of America's own customer survey reflects that 93% of customers understand that the DCC is voluntary, and our disclosures do not contain this type of language. Instead, at multiple points during the sales process we disclose that the DCC is optional, that the customer's decision whether to purchase the DCC will not affect their application for credit or the terms of any existing credit agreement they may have with Bank of America, and that they can cancel the DCC at any time.

In addition, we are concerned that customers will read the word "**STOP**" and either decide not to read further or make an adverse determination about the value of the DCC without fully understanding it. A meaningful disclosure should encourage the customer to read the entire disclosure – it should not deter the customer from reading further. We also believe that a disclosure should not bias a consumer's opinion one way or the other about the DCC. The word "**STOP,**" in bold font and all capital letters, is unduly prejudicial and will likely deter customers from purchasing a DCC that is not only recognized and authorized by other federal banking regulators and most states, but that is also significantly valued by consumers. In today's economic environment, our customers have found particular value in DCC features that can provide benefits in the event of unemployment. We believe that the word "**STOP**" implies that these DCCs have no value for a consumer and can have the effect of undermining the credibility and reputation of the creditor making the disclosure. Therefore, we would respectfully request that the word "**STOP**" be removed from the new disclosures.

2) Other Benefits

The proposals would require creditors to provide the following disclosure: "If you have insurance already, this product may not provide you with any additional benefits. Other types of insurance can give you similar benefits and are often less expensive." In the Supplementary Information, the Board explains that concerns have been raised about the cost of DCCs, which may be more costly than, for example, traditional life insurance, but may not provide additional benefits.

We believe the references to "insurance" in this disclosure incorrectly imply that a DCC is insurance. DCCs are not insurance. Instead, they are a loan term which can typically provide protection for more events than insurance policies. In addition, at least with respect to closed-end credit transactions secured by real property, it is highly unlikely that a consumer would already have insurance during the loan origination process that could provide the same or similar benefits as a DCC. Bank of America's mortgage DCC cancels a customer's obligation to make the monthly principal and interest payment for a period of time, in the event they experience a qualified life event such as Disability, Involuntary Unemployment, Hospitalization or Loss of Life. We are not aware of any insurance or other product that a customer could buy before obtaining a loan (i.e., such that they would already have it) which could provide these same benefits. Moreover, the alternatives the new disclosure would allude to do not replicate the benefits that would be available with DCCs. For example, a typical disability insurance policy usually requires that the insured be disabled for a minimum period of time prior to receiving benefits, and once benefits commence they are generally only 45-60% of the insured's normal wages. This reduced income amount may not be sufficient to continue meeting a borrower's monthly loan obligations together with other expenses. Our DCC can supplement these disability insurance proceeds by cancelling the borrower's monthly mortgage principal and interest payment (or minimum monthly line of credit payment) for a specified period of time. The same type of example applies in the context of unemployment, health and life insurance. The insurance may not replace the borrower's entire income or cover all expenses, and our DCC can supplement any insurance proceeds the borrower may receive by cancelling the monthly loan obligation for a period of time. For that reason, while the triggering events may be the same, we do not believe our DCC products can be fairly characterized as not providing any additional benefits to insurance products the borrower may already have, or even that the benefits available under our DCC products are similar to benefits provided by these other insurance products. Given that customers are unlikely to have insurance already that may provide them with the same or similar benefits as the DCC, we believe this disclosure requirement is inaccurate and misleading and could cause some consumers to mistakenly believe their existing insurance products will protect their credit account.

For the same reasons, we also believe that a statement that other types of insurance can provide similar benefits is misleading, particularly in the context of closed-end credit transactions secured by real estate. In that context, given that the "mortgage protection insurance" products described above are not regulated under Regulation Z like our DCCs, we do not believe it is appropriate to require creditors offering products or loan features that are subject to Regulation Z to make potentially misleading and inaccurate disclosures that have the effect of directing customers away from those products and features and toward other products and features that may not provide the same benefits and that may not be regulated in the same manner.

As a possible alternative, we would suggest that the Board adopt rules requiring the same disclosures required under the OCC's debt cancellation regulation in combination with the existing Regulation Z disclosures. Of note, this combined set of disclosures would notify the borrower that the DCC is optional, what the monthly fee is, what the total fee would be if they keep the DCC for the maximum term, and a direction to carefully review the eligibility requirements, conditions and exclusions that could prevent them from receiving benefits. We believe these disclosures would appropriately address the concerns raised by the Board about consumer comprehension of costs and benefits, without being required to make misleading statements about other products to the consumer's potential detriment.

3) Website Reference

The proposal would require creditors to provide the following disclosure: "To learn more about debt cancellation coverage, go to (Web site or the Federal Reserve Board)." In the Supplementary Information, the Board explains that most consumer testing participants indicated they would visit the Board's Web site to learn more about a credit insurance or debt cancellation product.

In light of the fact that DCCs vary from creditor to creditor, we believe the best source of information about the details of a particular DCC is the particular creditor. Therefore, we believe consumers should be directed to the particular Web site or phone number of the creditor offering the product

4) Signature Requirement

The model form of disclosures set forth in the proposal would require the borrower to sign the disclosure form. We believe this is inconsistent with the Telephone Sales Rule, which under the proposal would permit creditors (other than in connection with closed-end credit) to orally provide the disclosures required to exclude DCC fees from the finance charge if the creditor maintains evidence of the customer's affirmative election following receipt of the disclosures, and mails the disclosures in writing within three business days of the transaction. We believe creditors should be permitted to orally provide these new disclosures if the creditor maintains evidence of the customer's affirmative election following receipt of the disclosures, and then mail these new disclosures within three business days of the transaction. A wet signature requirement on the new form of disclosures would defeat the usefulness of a telephone sales process, which is used by a wide number of creditors.

**D. Telephone Sales Rule**

The Telephone Sales Rule under Regulation Z permits a creditor to orally provide the disclosures required to exclude DCC fees from the finance charge if the creditor maintains evidence of the customer's affirmative election following receipt of the disclosures, and mails the disclosures in writing within three business days of the transaction. The proposal would extend the Telephone Sales Rule currently available for DCCs sold in connection with open-end credit to DCCs sold in connection with HELOCs, but not to DCCs sold in connection with closed-end credit. The Board's stated rationale for not extending the rule to closed-end credit is that because monthly statements are not required for closed-end credit, it would be difficult for borrowers to detect an unwanted DCC fee. The Board also notes its belief that closed-end credit transactions generally do not offer a billing error resolution process for customers to dispute these charges.

Bank of America recommends that the Board extend the Telephone Sales Rule to closed-end credit transactions. While monthly statements may not be required for closed-end credit, if the Board adopts the type of adequate disclosures we have proposed above, including the follow-up communication after closing, there will be very little chance that a customer will not understand that they have purchased a DCC and what the fee is. If the Board does not extend the Telephone Sales Rule to all closed-end credit transactions, we would recommend that the final rule be revised so the Telephone Sales Rule is available for use on closed-end credit transactions if the borrower is given the opportunity to view the DCC fee as a separate line item on a monthly statement and the creditor offers a billing error resolution process for customers to dispute charges.

## Servicing-Related Proposals

### A. Adjustment Notices – Timing

The Board has proposed modifying the timing on the ARM adjustment notice from a minimum of 25 days to a minimum of 60 days before payment at a new level is required. In lieu of the 60 days, the Board has asked whether a minimum notice period of 45 days would better balance the concerns about providing sufficient notice to consumers and sufficient time for servicers to verify indices and prepare disclosures.

1. *Applicability:* It takes approximately 15 days to verify indices and prepare and distribute disclosures. Given this period and the contractually prescribed "look-back" period, it would be impossible for Bank of America to comply with both Regulation Z and its contract with the consumer on approximately 35% percent of our existing ARM portfolio. The index "look-back" period is contractual and we do not have the ability to unilaterally amend the contract. A 45-day advance notice requirement would still conflict with the contracts for approximately 20% of our existing servicing portfolio. It is imperative that any changes to the minimum ARM adjustment notice requirements apply only to new loans originated after the effective date of the changes.

2. *Conversion to Fixed-Rate:* Another key issue is whether the added notice period should apply when the interest rate and payment adjustments are due to the conversion of an ARM loan to a fixed rate mortgage. In today's environment, even the 25-day notice requirement has a negative impact on loan modifications that result from a loan workout arrangement with the consumer. Bank of America would support the elimination of the 25-day advance notice for this situation. The need to expedite loan modifications and the nature of the disclosures in modifications agreements should outweigh any need for advance notice of payment change.

## B. Adjustment Notices – Content

Among other changes, the Board has proposed that the ARM adjustment notice contain a disclosure of the maximum prepayment penalty possible if the consumer prepays in full during a specified time period. In addition, the proposed model ARM Adjustment Notice forms contained in Appendix H-4 include a disclosure of the escrow portion of the borrower's monthly payment.

1. *Prepayment Penalty Disclosure:* Providing a disclosure of the maximum prepayment penalty as part of the ARM adjustment notice would cause significant issues for Bank of America and other servicers. First, for existing loans, the information needed to make the calculation may not be readily available on the system for several reasons, e.g., mergers and servicing acquisitions. Servicers must often pull the loan documents in order to review the contractual language prior to calculating and imposing a prepayment penalty. This review would be a massive manual undertaking if it were required prior to the next ARM adjustment notice occurring after the effective date of the regulation for all existing loans in the portfolio. If retained, the requirement to disclose the maximum potential prepayment penalty should apply only to loans originated after the effective date of the revised regulations. In addition, the final regulation should be more specific in describing how the maximum penalty is to be calculated given the time period covered and the likelihood of changes in the loan such as the principal balance, after the disclosure is made.

2. *Escrow Disclosure:* We believe that inclusion of the escrow portion of the monthly payment in the ARM adjustment notice is unnecessary and may be confusing to borrowers. Borrowers are given notice of changes in monthly escrow payments in the annual escrow account statement required under RESPA and Regulation X. It is very possible that an escrow payment change could occur after the ARM adjustment is calculated but before the ARM payment change date, particularly if the required advance notice period is expanded. It would be confusing for a borrower to see escrow and total payment amounts as of a specified date (on an ARM adjustment notice) that are different than the amounts shown on an annual escrow disclosure and/or monthly statement.

## C. Pay Option ARM Periodic Statements

Under the proposal, servicers would be required to mail or deliver a periodic statement on Pay Option ARM loans that have a negative amortization feature at least 15 days before the payment is due. Bank of America agrees with the need to provide consumers with detailed information regarding payment options on these non-traditional products and currently does provide much of the information contained in the proposal. However, we do have a concern with the proposed timing on the requirement.

On first mortgage loans, most payments are due on the first day of the month with a late charge imposed after the 16th of the month ("late charge cut-off"). Requiring that the statement be mailed 15 days prior to the due date would require that the statements be prepared prior to late charge cut-off. Although payments are due on the first day of the month, many borrowers consider the 16th of the month the "due date," likely because of the absence of additional costs for paying during the 15 day grace period. In addition, servicers often generate monthly statements on an individual loan after a payment is made and then do a sweep sometime after late charge cut-off and before the end of the month and send statements to borrowers who have not yet made their payments. Requiring the monthly statement to be mailed before the 16th would thus change the statement generation cycle and cause statements to be issued that do not include the receipt of the most recent monthly payment which will cause customer confusion. We respectfully submit that a 10 day notice period would still give consumers an advance notice period, particularly when the late charge grace period is considered, but not interrupt the flow of the monthly statement production.

### D. Creditor-Placed Property Insurance

Under the proposal, creditors would be prohibited from charging borrowers for creditor-placed insurance during a 45-day notice period. The proposal would permit the creditor to charge the consumer if the consumer did not provide the creditor with evidence of adequate insurance during the 45-day notice period. The draft Commentary provides, "After expiration of the 45-day notice period, a creditor may retroactively charge a consumer for the cost of any required property insurance obtained during the 45-day notice period if such charge is not prohibited by applicable State or other law." Moreover, a creditor is required to "make a reasonable determination that the required property insurance has lapsed."

1. *Timing of Charge:* While it is not altogether clear, it appears that the proposal would prohibit a creditor from charging any premium if the borrower provides proof of insurance within the 45 days, even if there was a lapse of coverage for up to 44 days. That would mean that the creditor would be required to pay the premium for this lapse even though the consumer would have been in violation of the terms of the mortgage. Creditors have a duty to the investor and under regulatory requirements (for flood insurance) to ensure that there is no lapse in insurance coverage. We understand the Board's concern that consumers understand their duty to obtain insurance and the higher costs of creditor-placed insurance. Bank of America provides a detailed disclosure relating to insurance requirements at loan origination, and its current creditor-placed insurance notices also provide additional information about the impact of creditor-placed insurance well before we place the coverage. We submit that even though a creditor would be prohibited from charging the borrower until the required notice period had expired, the regulation should not prohibit creditors from retroactively charging for any lapse period, if permitted by the contract and applicable law.

2. *Determination of Lapse:* Neither the proposed regulation nor the commentary provides additional information on what would constitute a "reasonable determination." We request that the Board provide examples of actions that would meet this standard in order to avoid uncertainty and likely litigation. For example, notice from the insurer that the policy has lapsed should be sufficient to make such a determination.

3. Proposed comment 20(e)–1 would also clarify that the creditor may charge the consumer for the cost of any required property insurance obtained during the 45-day notice period if such charge is not prohibited by applicable State or other law. The National Flood Insurance Reform Act of 1994 provides preemption of state law restrictions with respect to placing and charging borrowers for creditor placed flood insurance. The comment should be clarified so that it is clear that the regulation does not impact the rights or obligations of lenders to place and charge for creditor placed insurance under the National Flood Insurance Reform Act. Alternatively, the definition of Creditor-placed property insurance should be modified to clarify that it does not include flood insurance. [3]

## Open-End Proposals

In this section, we have provided comments on the proposed changes to HELOC disclosures and substantive requirements.

### A. Three Business Day Disclosures

The proposal replaces existing HELOC disclosure with transaction-specific HELOC disclosures that must be provided to the borrower within three business days after application. In addition, the proposal includes stricter formatting requirements and must be provided in a tabular format. We offer the following general comments on this discosure.

1. *Lender-Paid Fees:* We recommend that the Board clarify that the creditor need not disclose any fees and charges that are paid by the lender and not passed on to the borrower. This is consistent with how fees relating to HELOCs are disclosed today.

2. *Multiple Payment Plans:* We request that the creditor be permitted the flexibility to provide applicants with information relating to more than two (2) payment plan options if the creditor offers more than two (2) such options. The consumer is better served when they are provided information about all of the options available to them.

3. *Credit Limit Disclosure:* The Proposal provides that the consumer may receive a refund of all fees paid if a disclosed term changes and the consumer decides not to open the account. The Proposal also makes the credit limit one of the disclosed terms. However, because the creditor will not have completed an appraisal and may not be able to verify the amounts of any prior liens on the property, the amount of the credit limit will usually be based on the applicant's estimate of the value of the property and the applicant's

[3] Although Bank of America currently does not charge the borrower if he or she provides evidence of insurance during the 45 day period, we believe that lenders should have the right to charge for any lapse in coverage. Otherwise, the borrower is without coverage or the lender is not compensated for providing coverage that the borrower was required to provide.. We also believe that if a loss occurs during the 45-day period and the consumer does not have coverage, the creditor should be able to charge the consumer for creditor placed insurance coverage insuring the loss regardless of whether the consumer eventually provides evidence of coverage during the 45-day period. However, the ability to charge the borrower in that circumstance necessarily follows from our suggested clarification.

estimate of the amount of the prior liens. If the creditor offers a lower credit limit than the amount disclosed because the actual value of the property is lower than the consumer's estimate and/or the amount of prior liens is higher, the creditor should not be required to refund the amount charged to the consumer for the cost of the appraisal or other collateral evaluation.

**B. Account Opening Statement**

The proposal makes significant revisions to the account opening statement. Among other things, it requires a tabular summary of key terms similar to the specific early disclosure format. In addition, the creditor must specify precisely charges including interest, account opening fees, transaction fees, annual fees and penalty fees. We offer the following comments on these provisions.

1. *Lender-Paid Fees:* As noted above, we recommend that the Board clarify that the creditor need not disclose any fees and charges that are paid by the lender and not passed on to the borrower.

2. *Loan Originator ID:* Because more than one loan originator may work on a HELOC account, we do not believe that it is helpful to list the ID's of all of the loan originators. We recommend that the creditor should not be required to list more than one ID, and that the creditor should be permitted to use any reasonable method to determine which loan originator is the primary loan originator whose ID should be listed.

3. *Optional Features:* The proposal addresses disclosures of certain options and features on both the application disclosures and the account opening disclosures. The proposal focuses on disclosure of a "fixed interest rate option," but that option is only one type of option or feature offered by creditors. Examples of other options are set forth below. Clarification on how to disclose other options is needed. We recommend that the heading of the "Fixed Interest Rate Option" section of the early and account opening disclosures be revised to "Options" and that the creditor list in this section any options that affect rates, fees, borrowing and repayment terms or payments together with a statement that "Details on these options are provided on a separate form." On that separate form, the creditor should be permitted to provide disclosures about each option offered. Examples of options include:

a. Convertibility Option: Allowing the consumer to convert all or a portion of the existing HELOC balance from a variable rate of interest to a fixed rate of interest, which balance is then paid down separately from the variable-rate balance. As the fixed rate balance is paid down, it replenishes the line.

b. Reduced Rate for ACH Payments: Reduced interest rate for accounts where the consumer provides for preauthorized transfers from the consumer's deposit accounts. If the consumer subsequently cancels the authorization, the rate will typically increase back to the unreduced rate.

c. Relationship Discounts: Reduced interest rate offered to consumers provided that the consumer establishes or maintains a deposit account or other relationship with the creditor.

d. Discount if Initial Draw is Taken: A creditor may provide a lower rate if the consumer agrees to take an initial draw of a specified amount.

4. *Default-Related Charges:* The Board requested comment on the appropriateness of the proposed clarification of charges for changes in terms. The proposed clarification that would exclude certain categories of default-related charges from classification as "charges imposed as part of the plan" is appropriate, because it would be practically impossible for a creditor to provide specific, detailed disclosures about such charges at the time of account opening.

## C. Periodic Statements

1. *Transactions and Fees:* The Board requested comment on the typical number of transactions and fees shown on periodic statements for HELOC accounts. The number of fees and transactions shown on a periodic statement are dependent on a number of variables. Generally, lines of credit with card access may have more transactions than fees. Lines of credit without card access with timely consumer payments may have few transactions and fewer fees. Consumers with untimely payment practices and payments returned will have more fees but not necessarily more fees than transactions. Consumers with more program features may also have more fees. The various combinations of these variables will impact the balance between transactions and fees. As a general comment it does not appear as though the "typical number of transactions and fees shown on periodic statements for HELOC accounts" are so numerous that they need to be segmented.

   The number of transactions on an account may vary based on a number of factors including the time of year (holidays, home improvements in spring and summer, back-to-school as a few examples of higher volume periods), whether or not the home secured line of credit is accessible with a card access device, and each individual consumer's own strategy concerning when and how the line of credit will be used. Because of these variables, it may be difficult to accurately predict "the typical number of transactions" on periodic statements. To aid the Board, it may be helpful to note that many accounts without card access devices may have only two transactions each month - a credit reflecting a payment and the finance charge determined solely by the application of one or more periodic rates.

   The number of fees shown each month on an account statement may vary based on such things as the programs and features the borrower is participating in, the consumer's payment and line utilization patterns, and the combination of these and other factors. As a few examples, a consumer: who pays late - meaning outside the contractual grace period - may be assessed a late fee; whose payment checks are returned may be assessed a return item fee; who promised to maintain a minimum balance, and who fails to do so may be charged a low-balance fee; and who promises and fails to met certain conditions may be charged an annual fee. The typical number of fees shown on a periodic statement is driven for the most part by the consumer's performance and preferences.

2. *Grouping of Fees:* The Board also requested comment on the burden to creditors and benefits to consumers of requiring fees to be grouped together on periodic statements for HELOC accounts. We agree that the consumer's ability to identify all fees is important for consumers to assess their cost of credit. We also agree that highlighting fees and interest for consumers would inform consumers of their costs of credit on HELOC accounts and we believe the present rule accomplishes this goal. We disagree, however, that consumer testing on credit card disclosures is relevant to whether or not grouping fees together on periodic statements for HELOC accounts will allow consumers to find fees more easily. Under the proposal, a creditor would be required to group all fees assessed on the account during the billing cycle together under one heading even if fees may be attributable to different users of the account or to different sub-accounts. Specifically, the Board would no longer allow fees and transactions to be interspersed in chronological order. We believe that the small number of transactions and fees on the typical HELOC periodic statement (as contrasted with unsecured card accounts) eliminates the need for this change, might create additional confusion because consumers are accustomed to transactions in chronological order, and imposes expensive and time intensive programming burdens on servicers with little or no benefit to consumers. For example, consumers may use unsecured credit cards to engage in a significant number of smaller transactions per billing cycle. On the other hand, consumers appear to use their HELOC accounts for only a small number of larger transactions each billing cycle, even if those HELOCs are linked to credit card devices. Consumers may have more difficulty identifying fees on unsecured credit cards when the fees are interspersed with transactions because of the large number of transactions shown on the periodic statement but this same difficulty does not appear to apply to HELOC accounts.

3. *Cost Totals For Statement Period:* The Board requested comment regarding the operational issues associated with carrying over cost totals in the circumstances described in the proposed commentary on cost totals for the statement period.

a. Acquired Accounts - Operational Issues: Under the Board's proposal an institution that acquires an account or plan must include, as applicable, fees and charges imposed on the account or plan prior to the acquisition in the aggregate disclosures provided under § 226.7(a)(6) for the acquired account or plan. Alternatively, the institution may provide separate totals reflecting activity prior and subsequent to the account or plan acquisition. For example, a creditor that acquires an account or plan on August 12 of a given calendar year may provide one total for the period from January 1 to August 11 and a separate total for the period beginning on August 12. The Board has not clarified what is and is not an acquired account and has provided no exceptions to the requirement - whatever it may be. If an acquired account is a HELOC loan that is part of a servicing transfer, or a transfer of subservicing, the operational burdens may be significant because HELOC loan servicers do not currently house this data and its retrieval and transfer may make servicing and subservicing transfers more costly and operationally challenging. For portfolios of servicers of HELOC accounts that have been seized, or have otherwise gone out of business, the acquiring servicer would not realistically or practically be able to gather and disclose this information.

The requirement may also cause confusion and an increase in questions and expensive phone calls to the acquiring loan servicer under either approach. If separate totals are provided, the consumer may challenge the totals from the prior servicer and the acquiring servicer may have little or no way to respond. If the fees and interest are disclosed in the aggregate, the borrower may not know which fees and charges belong to which servicer and again the acquiring servicer my not be able to respond, or respond accurately, to the prior servicer's fees and interest computations.

b. Account Replacement - Operational Issues: Under this part of the Board's proposal, a creditor that replaces a consumer's plan with another home equity line of credit plan with the consumer must include, as applicable, fees and charges imposed for that portion of the calendar year prior to the replacement in the aggregate disclosures provided pursuant to § 226.7(a)(6) for the new plan. For example, assume a consumer has incurred $125 in fees for the calendar year to date for a plan, which is then replaced by a home equity line of credit plan also provided by the creditor. In this case, the creditor must reflect the $125 in fees incurred prior to the replacement in the calendar year-to-date totals provided for the new home equity line of credit plan. Alternatively, the institution may provide two separate totals reflecting activity prior and subsequent to the replacement of the plan.

The Board may need to clarify whether or not the "account replacement" proposal only applies to a refinance by the same creditor of the same HELOC account and the account is and has been serviced by that same HELOC creditor as loan servicer at all times. If the requirement applies to a refinance of an account originated and serviced by another entity, the same operational issues outlined in the Acquired Accounts discussion above apply

If the proposal only applies to a HELOC loan refinanced by the same creditor that originated it, the same operational issues outlined in the Acquired Accounts section apply if the loan servicing of the HELOC account at any time was performed by an entity other than the the original creditor. As an example, entity X originates a HELOC account and sells the servicing rights to entity Y. The consumer is unhappy with the new loan servicer Y and comes back to X to refinance. In this case X has the same operational problems and burdens as an entity that obtains an acquired account.

Even if the same creditor both originated and serviced the loan, the creditor must engage in expensive and time consuming systems changes and testing to display the data on the monthly statement for interest and fee information.

Finally, whatever "account replacement" means, the Board should expect that consumers will be confused when they receive their first monthly statement on the new loan and it includes fees and interest. The consumer may think they were overcharged on the new loan. Confusion will likely increase expensive and time intensive customer calls to the call centers and an increase in research requests.

**D. Line Management**

The Board posed a number of questions regarding the provisions permitting creditors to suspend, reduce or terminate HELOC's in certain circumstances. Comments on those provisions are set forth below.

1. *Delinquency Threshold:* Under proposed changes to Section 5b(f)(2)(ii), a creditor would be prohibited from terminating and accelerating a HELOC on the basis of a delinquency unless the borrower has failed to make a required minimum periodic payment within 30 days after the due date. Related Comment 5b(f)(2)(ii) would be revised to also prohibit lesser actions such as permanently suspending advances or reducing the credit limit, imposing a penalty rate of interest, or adding or increasing a fee, unless the delinquency is at least 30 days. A creditor may temporarily suspend advances or reduce a credit limit for "default of any material obligation" for a delinquency of 30 days or fewer.

   We believe a delinquency threshold for account terminations provides an appropriate balance between the interests of creditors and consumers. Although most creditors likely would avail themselves of lesser remedies (such as suspending advances) for shorter delinquencies, creditors need to retain the right to terminate a HELOC based on a reasonable delinquency threshold (such as 30 days) in order to appropriately manage risk. Otherwise, a creditor may be required to continually reinstate a chronically delinquent borrower.

2. *Specific Threshold:* Because servicers will generally obtain information from credit reports that categorize delinquencies as 30, 60, or 90 days late, the proposed standard that would limit reliance on evidence of late payments of "30 days or fewer" is impractical, as it would require lenders to disregard all reported 30 day delinquencies, even though they might actually represent delinquencies of between 31 and 59 days. The better approach would be to adopt a standard that would limit reliance on evidence of late payments of "29 days or fewer", as that would enable lenders to rely on typical credit reporting categories without running afoul of the requirements.

   With that revision, the proposed Comment could be reasonably applied by servicers, as it would permit them to consider delinquencies of 29 days or fewer as one factor, but not the sole factor, in assessing whether there has been a "material change in financial circumstances." Of course, information about such delinquencies would likely come from sources other than credit reports, which generally report only delinquencies of 30 days or more.

3. *"Unable to Pay" Standard:* The Board requested comment on the proper interpretation of the "unable to pay" component of the statute's requirement that a creditor must have "reason to believe that the consumer will be unable to comply with the repayment requirements of the account due to a material change in the consumer's financial circumstances." We support the Board's efforts to provide greater clarity on this issue by crafting a meaningful mechanism for creditors to protect against losses while still assuring appropriate creditor restraint. In this regard, it would be helpful to provide a safe harbor that would permit a creditor to conclude that the borrower would be unable to pay for purposes of the material change in financial circumstances test if, as a result of information now available, the creditor either (1) would not have made the loan, (2) would have made the loan on materially less favorable terms and conditions, or (3) classifies the borrower in a higher default risk category since origination.

4. *Six Month Safe Harbor:* In connection with the review of payment failures in evaluating the material change in financial circumstances test, the Board has requested comment on the proposed safe harbor providing that a payment failure would be deemed to have occurred within a reasonable time if it occurred within six months of the creditor's taking action on the account. We support a comment that would establish such a "reasonable time" safe harbor, provided that the Board clarifies that a creditor may also rely on older payment failures for purposes of establishing a pattern of delinquencies sufficient to meet the creditor's standard for a "material change in financial circumstances". For example, one or two delinquencies within the prior six months might not be considered "material" by the creditor, but when combined with a pattern of delinquencies that began more than six months ago, it might be regarded as "material." The proposed six month safe harbor should not be permitted to create an inference that older payment failures may not be considered.

5. *Reliance on Credit Scores:* The Board requested comment on whether reliance on credit score declines alone is a proper basis for concluding that there has been a material change in financial circumstances, and on whether the Board should expressly permit or prohibit reliance on credit scores for such purposes. We agree with the Board's conclusion that credit scores may be a useful tool in prioritizing accounts for review and may also provide a strong empirical basis for conclusions about default probability. We support a comment that would specifically authorize creditors to use credit score information as appropriate in making decisions about suspending advances or reducing credit limits. Use of credit score information may be reasonable, for example, if the creditor uses a standard that combines credits scores as well as specific credit bureau delinquency information or similar information, or if the creditor has established a strong correlation between credit score declines and eventual default.

6. *Elimination of Access Device:* The Board requested comment on whether the elimination of an access device such as a credit card should be treated as an "insignificant change," and whether his example, if adopted, should be modified, broadened, or narrowed. We strongly support the addition to Comment 5b(f)(3)(v)



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that would permit the elimination of an access method if at least one original access method remains available. Such a change would be insignificant for the consumer, who would continue to be able to access the account, but it may be an important accommodation for a creditor (particularly a successor servicer) whose operational constraints might make the continued availability of a particular access method problematic.

7. *Calculation of Credit Line Reduction:* The Board requested comment on whether additional formulae for line reductions should be established. We believe that establishing additional, alternative formulae to determine the amount by which the credit line may be reduced (by the dollar amount of the decline, by the amount or percentage required to maintain the equity cushion, or other) would not be helpful and, at best, would add unnecessary complexity to an already complicated analysis.

8. *Amount of Value Decline:* The Board requested comment on whether a creditor should be prohibited from temporarily suspending advances on the line until, for example, the property value declines by the full amount of the credit line. We strongly oppose a prohibition against temporary suspensions until the property value declines by the full amount of the credit line. Unless maximum CLTV ratios and HELOC principal limits were significantly reduced, such a standard would obligate creditors to accept significant losses that would generally require properties to be under water before a HELOC could be suspended.

9. *Other Actions:* The Board requested comment on whether actions other than temporary suspension of advances or credit limit reductions under Section 5b(f)(3)(i) and (vi) might be appropriate in some instances. At present, the "prohibited provisions" paragraph of Comment 5b(f)(3)(i) limits the flexibility of lenders and borrowers to agree to actions other than suspensions of advances or credit limit reductions. If Regulation Z and the Commentary were amended to allow post-origination rate changes for new advances on home equity lines, lenders and borrowers would be able to agree to adjust the pricing to account for changed circumstances such as those present in today's unprecedented economic environment. Consumer protections against abuse could be maintained by requiring lenders to base any increase in rates for new advances on a significant change in the collateral value, or on clearly defined triggers or other circumstances specified in the loan agreement. Customers could have to agree to changes by opting in. Greater pricing flexibility would be in the best interest of both the lender and the borrower.

   We recognize the need to ensure that this approach protects consumers and offers them more and better options than are currently available. We believe, however, that there are many cases where both lenders and consumers can benefit – this is, where the choice need not be between lending at rates that cannot be considered safe and sound, and not lending at all. Consequently, we would propose the following parameters and limitations, which would be provided for in the lending agreement and in the proposed amendments to the Regulation and Commentary:

a. Repricing would be limited to new advances only, so existing balances would continue to be priced at the rate determined from the original contract.

b. Repricing would be limited to a "reasonable" increase in margin based on the then-existing circumstances. An increase of up to 500 basis points would be deemed presumptively reasonable.

c. Repricing would be permitted for significant declines in property value and for triggers or circumstances specified in the loan agreement, which include the current triggers for blocking or reducing lines.

d. The process and limits on re-pricing must be clearly set forth in the line of credit agreement.

Upon either (i) the decline in the value of a borrower's security property to a sufficient level to trigger a block or reduction, or (ii) the occurrence of the trigger or circumstance set forth in the agreement, the lender would be permitted to block or reduce the account, as provided under current law. If the lender wishes to continue to allow access to credit, a notice would inform the borrower of that option, the applicable margin increase level, and new price that would apply to existing balances and future advances. The borrower will be advised that they may continue to draw upon those terms if they opt-in in writing (including electronic signature). If the consumer does not opt-in, their account would continue to be blocked or reduced.

10. *Consumer Requests for Suspension:* The Board requested comment on whether persons who have an ownership interest in the property but are not liable on the credit line should be able to request suspension of advances and reduction of the credit line. We support a comment affirming that creditors may, but are not required to, honor a request to suspend or reduce a HELOC from a party to the mortgage but not the HELOC agreement.

11. *Computation of Available Equity:* The Board requested comment on whether it should clarify that the creditor may (but does not have to) consider any changes in available equity based on how much the consumer owes on a mortgage with a lien superior to that of the HELOC. We support the clarification that changes in the first mortgage balance (due to negative amortization or otherwise) may be considered in evaluating changes in equity.

12. *Monitoring of Conditions:* The Board requested comment on whether creditors should be required to continually monitor for possible reinstatement of accounts. We oppose any change that would require the creditor to perform ongoing monitoring for reinstatement in all cases after suspending or reducing a HELOC. Imposing such a rule would be extremely burdensome and would increase expenses to consumers. The existing system, which permits the creditor to require the borrower to request reinstatement, has worked well.

13. *Reinstatement Review:* The Board requested comment on whether 30 days is an appropriate time frame for responding to requests for reinstatement. We believe this time period would be appropriate, provided the 30 days is measured from the time of receipt of all information requested from the consumer or from a third party (e.g., an appraiser) by the creditor.

14. *Fees for Reinstatement:* The Board requested comment on whether the amount of fees be disclosed along with the notice that the consumer must request reinstatement, and the burdens and benefits of this requirement. Any requirement to disclose potential reinstatement fees should permit flexibility in such disclosures – e.g., permitting a range of fees, etc., since creditors may not know precisely the costs of appraisals, etc. at a future date. With respect to the allocation of costs for reinstatement requests: (a) the rule should clarify that any first free reinstatement request does not apply to line actions taken prior to the effective date of the new regulation, nor should it apply to any HELOC originated prior to such date if the related agreement specifically allocates such costs to the consumer; and (b) the rule should not obligate the creditor to pay for an appraisal if its normal process for reinstatement based on value uses one type of valuation (e.g., a BPO) but the borrower continues to dispute the creditor's conclusion.

15. *Underlying Documentation:* The Board requested comment on whether creditors should be required to provide consumers with a copy of the documentation on which it relied to freeze or continue a freeze on the line of credit, as well as the operational practicality for creditors of obtaining and providing the required documentation. We believe such a requirement would be impractical and burdensome. For example, the format of property valuation data provided by valuation vendors may not be helpful. Accordingly, we recommend that this requirement not be adopted.

16. *New Safe Harbor*: Although we support the Board's proposal to establish a new "safe harbor" for determining a "significant decline in value" in situations involving an original CLTV of 90 percent or more, the proposal should be qualified by stating that, in any event, a decline in value below the combined amount of the first mortgage balance and the HELOC limit would be deemed significant even if there had been less than a 5 percent decline in property value. Otherwise, creditors in certain high CLTV situations would not be able to rely upon a "safe harbor" to suspend or reduce the limit on a HELOC until the property value had declined below such combined amount, resulting in negative equity.

17. *Consideration of Valuation Trends:* The Board requested comment on the propriety of considering a clear and consistent trend of declining property values in the market area in which the securing property is located. We support a comment that would affirm creditors' ability to consider property valuation trends within an appropriate market area in evaluating equity declines for HELOCs. As recent experience has demonstrated, valuations are generally based on lagging data and thus may understate the magnitude of declines by the time they are obtained, so a mechanism that would permit projected values to be considered in making line management decisions is

appropriate. Such a mechanism could be an effective mitigant against overextensions of credit that often lead to foreclosure.

18. *Valuation Methods:* We strongly support the Board's proposed comment that would specifically acknowledge the permissibility of using AVMs, BPOs, and TAVs as methods for obtaining valuations for line management matters involving HELOCs. We believe that the comment should add that it is within the creditor's sole discretion to rely on such valuations and on other valuations (including appraisals) obtained by the creditor in connection with its line management and reinstatement policies. Otherwise, creditors may be subject to an endless and expensive battle of conflicting appraisals and potential litigation, as borrowers might attempt to submit appraisals with values that exceed the values of appraisals or other valuations obtained by creditors.

19. *Further Guidance:* The Board requested comment on what further guidance should be provided for compliance relating to the two-part test for a material change in financial circumstances, including guidance related to factors that might indicate poor future performance on credit obligations. We strongly support a comment that would affirm the propriety on reliance on additional criteria such as credit utilization, the number of new accounts, and evidence of unemployment as indicators of a material change in financial circumstances.

## E. Miscellaneous Questions

1. *Type of Property:* The proposal allows the creditor to assume that the property securing the line of credit is the principal residence or a second or vacation home of the consumer and, therefore, subject to the HELOC rules. However, if the creditor investigates the actual use of the property and determines that it is secured by property other than a principal residence, second or vacation home the creditor must comply with the rules applicable to open-end (not home-secured) credit under Regulation Z. We propose that the Board clarify that, if a property is discovered to be other than a principal residence, second or vacation home, the creditor be permitted to comply with either the rules applicable to open-end (home-secured) or open-end (not home-secured).

2. *Reverse Mortgage Model Forms:* The Board requested comment on whether additional guidance for reverse mortgages would be appropriate. Additional guidance relating to how to meet the disclosure requirements under Section 5b(c) for reverse mortgages would be helpful. As the Board is aware, reverse mortgages do not have any repayment requirements until a triggering event such as the death of the borrower or failure to occupy the home as a principal residence. In addition, there is no defined draw period and borrowers have the flexibility to take advances in a variety of different payment plans, including a line of credit. Because of the unique features of a reverse mortgage, it would be helpful to have model forms in Appendix G developed specifically for them. Regulation Z does provide for model disclosure for the Total Annual Loan Cost Rate in Appendix K which is unique to reverse mortgages. To the

extent that the new open end or closed end disclosure requirements will also apply to reverse mortgages, it would be helpful to have forms that match the terminology applicable to reverse mortgages rather than trying to fit within the forms developed for traditional forward mortgages. This would also reduce the potential for borrower confusion.

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Once again, we appreciate the opportunity to comment on the Board's proposal. Please contact the undersigned or Thomas J. Noto (949.222.8305) if you have any questions.

Sincerely,

Gregory Baer

Greg Baer